deal at all effectively with the instability of the family. The formal procedure of both the criminal and the civil court is as much out of place as "Police Court procedure" in dealing with a divorce case. The judge should have all the freedom which characterizes the juvenile court, and should feel that he is the representative of society in this weighty matter of severing family bonds. He should have one or more "divorce proctors" at his disposal to carefully investigate every case that comes before the court, and to ascertain whether the interests of society will be served or not in dissolving a particular family group. If it be for the best interest of society that the family group should remain intact, then the judge should informally exercise his good offices, and even the power of the law, to effect a reconciliation.

These proposals are not impractical dreams, because they are already beginning to be carried out in some of our courts. They perhaps amount in effect to saying that in every city of any size there should be special Courts on Domestic Relations, before which should come in the first instance all cases applying for divorce. These courts should investigate the cases carefully to see if reconciliation can be effected, or if the interests of society demand that family bonds be severed. Only after all efforts to maintain the family life have failed should the cases finally go before the divorce courts for the formal decree of separation. The city of Chicago is to be congratulated upon being the first to establish an efficient Court on Domestic Relations; but it has not gone far enough until every application for divorce is brought primarily before this court.

CHARLES A. ELLWOOD.

STOPPATO ON JURY SERVICE.

Alexander Stoppato, of the University of Bologna, has written a most interesting and instructive article in the March-April number of *Il Progresso del Diritto Criminale.* This magazine, published in Rome, is dedicated to the promotion of practical reforms in criminal law by the application of true juridical theories. Stoppato's article deals with the reform of the present jury system in Italy. The system there differs in some respects from our own, but his observations are of interest to American readers because of the many complaints against existing systems in the several states. It is strange to discover that he would make the jury a more practical institution by giving it more power, whereas the American reformers think that it should be abolished, and in fact in many states a jury trial is merely demandable by the parties if they want it;

otherwise their case is tried by a judge alone. In those states we may well observe that the retention of the jury as a right was due to constitutional provisions and not from any desire to retain it.

Stoppato thinks that the jury is not a political institution existing to counterbalance the institution of the judgeship in the way somewhat analogous to Montesquieu's tri-divided government, but he states that it serves a social duty, and that its true sphere lies in "declarations that show the development of the public conscience which determines the degree of criminality under changeable social conditions." In other words, as criminality is admitted by all philosophers of law to be relative, it is apparent that a jury chosen from the people is better adapted to determine what the exact existing state of criminality is than a judge whose life is given over to the study of statutes and precedents; that is, that a jury—to use a figure of speech—has its ear closer to the ground and can better weigh the morality or immorality of a crime. By this Stoppato does not mean to throw over the law of the statutes, but merely to hold that two elements should enter into a conviction for a crime; first, the consideration of whether the act is against a written law, and, secondly, the amount of unsocial mentality that entered into its commission, and that a jury is best fitted to consider the latter.

He holds that the fact that good results are not always obtained by the jury system does not reflect on the justice of the institution, but upon the rules that govern it. Many judges complain of it, and yet in the majority of cases substantial justice seems to be obtained and public opinion seems satisfied. To consider this without bias we must discard some convictions which are the result of a rigorous legal training, and conservative members of the legal profession must become less conservative. To-day, punishment for crime is no longer considered as a revenge, or entirely as a preventive; it is reformative, and reformative powers must be contingent and relative. Admitting that the jury is a better judge of the trend of life on the street, it should surely be allowed the control of the part of the criminal prosecution which deals with the circumstances under which the crime was committed. He thinks that jurors show stringency where there is a popular demand for it, and are lenient where the feeling is not so strong against the crime. This he thinks is evidence of the claim that the jury is the thermometer of the popular conscience, and he thinks that the popular conscience is the originator of criminality, and should be followed by the law.

Having thus outlined the general reasons for giving the jury more power, he takes up details of specific reform. The social conscience should of course be worthily represented. To obtain this end he thinks

that the number of jurors could be lessened (to avoid an unwieldy body), and the right to challenge could be reduced to obtain juries more representative of the people at large. He thinks that—within certain bounds —juries should be no more challengable than judges. He has many doubts as to the maxim that the jury is the judge of the facts and that the judge is the judge of the law. He recognizes the difficulty of applying this statement and while he does not think that the jury should be the judge of the law without instruction, he thinks that the judge should explain what the law is, and ask a series of questions based on the law and the facts for determination by the jury, and that thus, under instruction the jury should find both the law and the facts. We may say that our experience with American juries does not lead us to embrace this proposition with any conviction of success, but in other countries, the different education and up-bringing of the citizens leads to the obtaining of juries of greater fitness. He proposes that the first question should be as to the existence of the fact alleged, the second as to its authorship, and the third as to the guilt of the defendant. The third question should be extended by a complete statement of the law and the defense applicable thereto.

He then takes up the right of the accused to refuse to give evidence. The practise here is so different from the American practise that we may well omit it, but his next problem is one of great interest. He thinks that the jury should be allowed to participate in the determination of the penalty; that the judge should tell them the maximum and minimum penalty, what circumstances may be taken in mitigation of the offense, and then each juror should be allowed a vote as to what penalty he thinks would be just. Theoretically, we deem that this would be ideal, and perhaps in France, where the juries in Somme, Garde, Saone and Loire, and elsewhere have demanded the right to participate in its determination, alleging that they could not reach the sense of guilt without knowledge of what results their action would have, this plan would have good practical results. In Italy, Stoppato confesses that no such demand has been made, but even there the interest of the people in prosecutions might justify it. It is well to remember that Italy at the present time is thoroughly alive to legal reforms, and is enjoying the existence of an active School of Legal Philosophy which we may go so far as to say leads present juridical thought. In America, however, the interest taken by the people, and consequently by the juries chosen from them, is not such as to give one confidence in their ability or willingness to pay sufficient attention for the correct determination of sentences by which criminal justice is upheld. In Switzerland a law allowing such a participation on the part

of the jury has been passed, but again we must remember that Switzerland is a law unto itself because of its size, its geographical position, and its people.

In conclusion we may say that Stoppato's theory for the decreasing of the number of jurors, for allowing them to determine certain legal propositions under the instruction of the judge, and for allowing them to participate in the quantum of the penalty, and for the reduction in the number of challenges in order to make the jury more representative of the people at large, all seem to us to be theoretically correct, but as impracticable in America as they are theoretically desirable. If they are found promotive of the best interest of criminal justice in Italy we can only say once more that the smaller and homogenous countries have many advantages which our larger and heterogenous unit lacks.

JOHN LISLE.